No. 90455-3

SUPREME COURT
STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

RESPONDENT'S RESPONSE TO MEMORANDUM OF AMICUS CURIAE WASHINGTON SELF-INSURERS ASSOCIATION SUPPORTING THE PETITION FOR REVIEW

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I. INTRODUCTION

This brief is filed in response to the Memorandum of Amicus Curiae filed by the Washington Self-Insurers Association (Self-Insurers). Unfortunately, the Amicus brief fundamentally misstates what the Court of Appeals held in this case. The brief also, based in part on its misstatement of the holding, incorrectly suggests that the Court of Appeals' decision misinterprets the law, violates the legislative intent, and results in a disparate treatment of workers.

The arguments set forth in the Amicus brief are flawed and do not provide a rationale basis for the granting of review of this case.

II. STATEMENT OF THE CASE

Respondent previously submitted a Statement of the Case with its Brief in Response to the Petition for Review.

III. ARGUMENT

A. THE COURT OF APPEALS' DECISION DOES NOT GIVE CRABB A COLA. IT SIMPLY ALLOWS HIM TO BENEFIT FROM THE STATUTORILY MANDATED INCREASE IN THE MAXIMUM TIME LOSS RATE.

The Self-Insurers' brief repeatedly asserts or implies that the Court of Appeals' decision gives claimants such as Mr. Crabb a Cost of Living Adjustment (COLA) effective July 1, 2011, something that the legislature

specifically eliminated.[1] However, this is not what the Court of Appeals' decision did.

The Court of Appeals' decision does not allow Mr. Crabb to benefit from the July 1, 2011 COLA. The Court of Appeals repeatedly acknowledged the COLA freeze and made it clear that the basis for increasing Mr. Crabb's time loss payments was not a COLA, but was instead the increase in the maximum rate pursuant to RCW 51.32.090(1),(9), a statute that was not affected by the 2011 legislation. As the Court of Appeals explained, citing RCW 51.32.090(1),(9), "[b]ecause the Department correctly fixed Crabb's benefit schedule in excess of the maximum monthly payment allowed by RCW 51.32.090(9), increases in the maximum monthly payment operate as a mechanism to increase Crabb's benefits." *Crabb v. Dep't of Labor & Indus,* ____ Wn.App. _____, (No. 44343-1-II, June 5, 2014)(slip. op.), p. 10

B. THE COURT OF APPEALS' DECISION DOES NOT UNDERMINE THE INTENT OF THE LEGISLATURE.

In its brief, the Self-Insurers argued that the Court of Appeals'

[1] See e.g. Memorandum of Amicus Curiae Washington Self-Insurers Association Supporting the Petition For Review, p. 1 ("higher income claimants will receive a COLA for 2011..."), p. 3 ("Did the Legislature intend that claimants receiving temporary disability ("time loss") at the statutory maximum level receive a COLA for 2011...), p. 6 ("The effect of the Court of Appeals interpretation of the COLA freeze, that it does not apply to claimants whose benefit were calculated at the maximum allowable rate...").

decision undermines the intent of the legislature to save money. This argument is incorrect.

While EHB 2123 was meant to save money, these savings were not applied across the board. The legislature did not cut all types of benefits. For example, no cuts were made to the amount of permanent partial disability paid to workers or the amounts paid for treatment or loss of earning power benefits. The legislature chose which benefits to reduce and which benefits not to reduce to achieve its goal. There is nothing in the legislative intent to suggest that it was meant to freeze maximum rates.

The Self-Insurers argument, therefore, has no more merit than an argument that a court decision that refused to reduce such things as permanent partial disability amounts or treatment or loss of earning power benefit amounts would defeat the legislature's intent.

C. AMICUS' SUGGESTION THAT THE DECISION WOULD UNFAIRLY FAVOR INJURED WORKERS IS WITHOUT MERIT.

The Self-Insurers' brief suggested that "the Court of Appeals' decision introduces a disparate treatment into the workers' compensation system... the Court of Appeals has now created "haves" and have-nots" in the workers' compensation system..." [SIC] Self-Insurers Amicus, p. 7.

This is simply not true. The disparate treatment of injured workers already existed in the workers' compensation system. Unlike

lower wage workers, high wage earners who are injured on the job have their wage replacement amounts capped by a maximum compensation rate.

There are also legitimate and understandable reasons why the legislature may have chosen not to prevent high wage earners from benefiting from the increase in the maximum rate cap. While non-capped workers receive anywhere from 60 to 75 percent of their earnings in their initial time loss rate, Mr. Crabb, due to the maximum rate cap, received less than 48 percent of his wage of injury ($4,258.40 maximum rate / $8,917.92 wage of injury). (See Stipulation of Facts, Facts 1, 4, and 8). It is quite conceivable that the legislature decided that it would be unfair to further punish these workers by preventing them from benefiting from their normal maximum rate increase.

D. THE SELF-INSURERS' INTERPRETATION OF THE STATUTORY SCHEME WOULD CAUSE AN ABSURD RESULT.

The Self-Insurers' interpretation of the statutory scheme fails to take into account the annual increases in the maximum rates provided in the statutory scheme. As the Court of Appeals explained in addressing a similar argument brought forward by the Department, this argument "produces an absurdity of its own. The Department asks us to hold on one hand that Crabb's rate of payment is determined by the maximum

payment provisions, but then to hold on the other hand that changes to the maximum payment provisions have no effect on Crabb's rate of payment. This absurdity is difficult to accept." *Crabb,* at p. 9.

As the Court of Appeals explained, the express language of RCW 51.32.090 provides that workers "shall" receive benefits according to the statutory schedule during his disability. "Only by allowing Crabb to benefit from the increases in the monthly cap can this requirement be met. Denying him that benefit because the COLA was suspended reads RCW 51.32.090(1) right out of the statutory scheme." *Crabb,* at p. 10.

IV. CONCLUSION

Nothing brought forward in the Self-Insurers' Amicus brief changes the fact that this case does not meet the criteria set out in RAP 13.4(b) to warrant review by the Court.

The Court of Appeals did not allow Crabb to receive a COLA effective July 1, 2011. Instead, the Court of Appeals properly allowed Mr. Crabb to benefit from the maximum rate increase provided for in the statutory scheme, an increase that the legislature did not eliminate with the 2011 legislation.

The effects of the Court of Appeals' decision do not contravene that legislative intent. It simply gives Mr. Crabb the adjustment in his rate

called for by the statute, an adjustment that slightly decreases the negative burden imposed on him by the maximum rate cap.

For the above-stated reasons, review in this case should be denied.

DATED this 22nd day of September, 2014.

SMALL, SNELL, WEISS & COMFORT, P.S.
Attorneys for Respondent, Joseph C. Crabb

By: 
David W. Lauman, WSBA #27343

OFFICE RECEPTIONIST, CLERK

To: Patti Klein
Subject: RE: Crabb v. Department of Labor & Industries, Case No. 90455-3

Rec'd 9/22/14

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From: Patti Klein [mailto:pak@sswc-law.com]
Sent: Monday, September 22, 2014 1:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: David Lauman; Kris.Tefft@WSIAssn.org; SteveV1@ATG.WA.GOV
Subject: Crabb v. Department of Labor & Industries, Case No. 90455-3

Re: Joseph C. Crabb v. Department of Labor and Industries
Case No. 90455-3

Dear Clerk:

Attached for filing from respondent's attorney, David W. Lauman, WSBA #27343, (253) 472-2400, DWL@sswc-law.com, is Respondent's Response to Memorandum of Amicus Curiae Washington Self-Insurers Association Supporting the Petition for Review. Also attached is our Certificate of Service.

By copy of this e-mail, as well as hard copies sent via U.S. Mail, all parties will receive copies of respondent's response.

Sincerely,

Patricia Klein
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